UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALIS S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL, Plaintiffs, v. GEORGE W. BUSH, President of the United States, NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Porter J. Goss, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director; JOHN D. NEGROPONTE, Director of National Intelligence, Defendants.	Case No. 06-cv-313(GEL)(KNF)

MEMORANDUM OF LAW OF AMICUS CURIAE THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN OPPOSITION TO DEFENDANTS' INVOCATION OF THE STATE SECRETS PRIVILEGE

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The Association of the Bar of the City of New York (the "Association") respectfully submits this brief as amicus curiae in order to oppose defendants' invocation of the state secrets privilege in response to plaintiffs' motion for partial summary judgment and in support of defendants' motion to dismiss.

I. STATEMENT OF INTEREST OF AMICUS CURIAE.

Founded in 1870, the Association is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Civil Rights Committee, the Association educates the Bar and the public about legal issues relating to civil rights, including the right of access to the courts, the right to counsel and the right to remain free from unreasonable searches and seizures. As one of the nation's oldest and largest local bar associations, the Association also has long had a significant interest in maintaining a strong and effective judicial branch with the ability to restrain lawlessness, no matter who commits it.

The Association believes that individual liberties, including the right to seek judicial review of illegal government action, need not be subverted during times of war. National security can be achieved without prejudice to constitutional rights that are at the heart of our democracy, and over the past several years the Association has attempted to demonstrate this by various means, including through the filing of an amicus curiae brief supporting plaintiffs' motion for partial summary judgment concerning the illegality of the National Security Association's ("NSA") Surveillance Program.

II. SUMMARY OF ARGUMENT.

The Association submits this brief for two purposes: first, to emphasize that the government's invocation of the state secrets privilege in response to this and numerous other lawsuits challenging illegal government activities is deeply troubling and threatens to undermine the rule of law and the role of the courts and legislature in our system of checks and balances; and, second, to express its view that the invocation of the state secrets privilege in these circumstance is, in any event, unwarranted because the Administration's public statements provide all the information needed to determine the illegality of the NSA Surveillance Program.

III. THE GOVERNMENT'S INVOCATION OF THE STATE SECRETS PRIVILEGE THREATENS TO UNDERMINE THE RULE OF LAW AND THE ROLE OF THE COURTS IN RESTRAINING EXECUTIVE LAWLESSNESS.

The Association is deeply troubled by defendants' invocation of the state secrets privilege in this matter and its implication for the rule of law and the system of checks and balances that is integral to our Constitution. By implementing the NSA Surveillance Program, the Executive acted in violation of federal statutes and thus undermined congressional regulatory authority. By invoking the state secrets privilege, the Executive now also seeks completely to eliminate judicial oversight in this area. The invocation of the state secrets privilege here is particularly troubling in that this is just one of numerous examples in which the government now seemingly routinely asserts the state secrets privilege in order to attempt to insulate its conduct from judicial review.[1] As the OMB Watch recently noted, "[i]n just five and a half years, the Bush administration has used this privilege almost half the number of times it was invoked between 1953 and 2001, when the combined use of 8 presidents—Eisenhower, Kennedy, Nixon, Ford, Carter, Reagan, the first Bush and Clinton—amounted to 55 claims of state secrets. While in the past the power was used to keep specific documents from disclosure, recently the privilege appears to be invoked to deflect lawsuits against the government."[2] Indeed, just this week defendants sought (improperly) to have this matter transferred and coordinated as part of a large, proposed MDL proceeding that would involve more than 20 actions in which the government is asserting the state secrets privilege. (See Defendants' Notice of Motion to Transfer to the Joint Panel on Multidistrict Litigation, filed June 26, 2006.)

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[1] See, e.g., Scott Shane, Invoking Secrets Privilege Becomes a More Popular Legal Tactic by U.S., N.Y. Times, June 4, 2006, at 32; El-Masri v. Tenet, No. 1:05 CV 1417, 2006 U.S. Dist. LEXIS 34577 (E.D. Va. May 12, 2006) (privilege asserted against a German citizen who claimed he was wrongfully seized as a member of a known terrorist organization and extradited to Afghanistan under the government's extraordinary renditions program); Edmonds v. United States Dep't of Justice, 323 F. Supp. 2d 65 (D.D.C. 2004) (privilege asserted against a former FBI translator alleging retaliatory termination after she reported alleged misconduct within the FBI); Burnett v. Al Baraka Inv. & Dev. Corp., 323 F. Supp. 2d 82 (D.D.C. 2004) (privilege asserted to block plaintiffs from questioning a former FBI translator about her allegation that the FBI had foreknowledge of al-Qaeda's attacks on September 11, 2001).

As the Supreme Court has noted, it is important for the Judiciary to ensure that the state of war does not become a "blank check" for the President to do away with the individual protections the Constitution affords. See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004). The Constitution establishes an appropriate balance between the powers of the executive and legislative branches; accordingly, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb". Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Such is the situation here, in which defendants blatantly violated the Foreign Intelligence Surveillance Act ("FISA") and thus directly undermined Congress' constitutional authority to legislate. As plaintiffs discuss in their Memorandum in Support of Their Motion for Partial Summary Judgment ("Pls.' Mem."), "in FISA, Congress directly and specifically regulated domestic warrantless wiretapping

[2] See Shays Looks to Limit State Secrets, available at http://www.ombwatch.org/article/articleview/3481/1/1?TopicID=1.

for foreign intelligence and national security purposes, including during wartime". (Pls.' Mem. at 15.) Congress decided that "foreign intelligence electronic surveillance must be conducted pursuant to statute, and pursuant to court order", and "[i]t underscored that intention by making wiretapping without statutory authorization a crime". (Id. at 14.) Neither the Authorization to Use Military Force by Congress nor the President's inherent powers under Article II of the Constitution empowered defendants to circumvent the procedures established by FISA to engage in warrantless electronic surveillance under the NSA Surveillance Program. (See generally id. at 14-32.) To allow invocation of the state secrets privilege to shield from judicial review the Executive's surveillance activities outside this exclusive scheme would render FISA unenforceable, thus nullifying Congress' constitutional authority to regulate these activities; deprive the courts of their constitutional role in assuring that the Executive complies with the law; and encourage executive lawlessness. It would undermine the fundamental principle of the rule of law that no one, including the Executive, is above the law.

The Judiciary's constitutional duty to oversee activities of the Executive has been recognized in this country for as long as the doctrine of judicial review itself. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). Although this duty sometimes yields when judicial review would compromise national security, this case differs from previous cases in which courts have upheld the invocation of the state secrets privilege in two important ways, both of which counsel against accepting the state secrets privilege here. First, as described above, the Executive's actions in this case directly implicate the separation of powers between the executive and legislative branches, which makes the need for judicial review of the NSA Surveillance Program more pronounced.

Second, electronic surveillance is an area that, for good reasons, has traditionally been subject to continual and searching judicial scrutiny, meaning that there is a stronger precedent for judicial review here than in other cases in which the state secrets privilege has been accepted. Moreover, contrary to defendants' assertions, the factors counseling against accepting the state secrets privilege here are not outweighed by defendants' blanket and limitless reliance on the Executive's wartime powers.

Judicial review is particularly appropriate and meaningful here because, as discussed, the Executive's actions contravene explicit congressional directives, and thus threaten to undermine our constitutional system of separation of powers. Even in situations in which the Judiciary usually defers to the Executive, such as when the President claims official immunity or invokes a privilege, "the exercise of jurisdiction [is] warranted" "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance". Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982); see also Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring) (noting that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, . . . [p]residential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system".). In cases like this, "[j]udicial deference to the privilege . . . amounts to complicity with the executive branch in undermining congressional power and responsibility". William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 Pol. Sci. Q. 85, 90 (2005).

Judicial review is also particularly important in the area of electronic surveillance, as the Supreme Court and Congress have both recognized. Indeed, the

Supreme Court has specifically emphasized the need for "adequate judicial supervision or protective procedures" in conducting electronic surveillance in order to avoid abuse. Berger v. New York, 388 U.S. 41 (1967). The Supreme Court has also clearly held that the Fourth Amendment requires judicial review of domestic surveillance practices. United States v. United States District Court (Keith), 407 U.S. 297, 317 (1972) ("[t]he historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech"). Accordingly, Congress enacted, and the courts have upheld, comprehensive federal laws—including FISA—that require judges to approve electronic surveillance before it starts, review it as it continues and when it ends and provide a forum for victims of unlawful surveillance. 18 U.S.C. § 2511(2)(f) (FISA provides the "exclusive means by which electronic surveillance . . . may be conducted" within the United States); Berger, 388 U.S. at 55-57 (holding that the Fourth Amendment requires the government to follow certain minimization procedures to limit the scope of the intrusion that is incident to the surveillance process); 50 U.S.C. § 1806(e) ("[a]ny person against whom evidence obtained or derived from an electronic surveillance to which he is an aggrieved person is to be, or has been, introduced or otherwise used . . . may move to suppress the evidence obtained or derived from such electronic surveillance on the grounds that—(1) the information was unlawfully acquired; or (2) the surveillance was not made in conformity with an order of authorization or approval"). This strong history of judicial review of the Executive's surveillance activities—and the compelling rationale underlying it—strongly cautions against accepting the Executive's invocation of the state secrets privilege in the context of illegal government surveillance.

Courts also should not abdicate judicial responsibility here simply based on defendants' broad claim that the President has the authority to engage in warrantless wiretapping during times of war. (See Defs.' Mem. at 32 ("Wartime interception of international communications on public networks to identify enemy communications is a historical and necessary incident of warfare and within the authority of the Commander in Chief".)); see also Attorney General Alberto Gonzalez, Press Briefing (Dec. 19, 2006) ("[W]e also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War . . . ").) The Supreme Court has emphasized that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens"; instead, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake". Hamdi, 542 U.S. at 536. Moreover, "blind acceptance by the courts of the government's insistence on the need for secrecy . . . would impermissibly compromise the independence of the judiciary and open the door to possible abuse". In re Washington Post Co. v. Soussoudis, 807 F.2d 383, 392 (4th Cir. 1986).

Particularly in a case in which the Executive is accused of flagrantly violating statutory and constitutional law by engaging in warrantless electronic surveillance, the Executive should not be permitted simply to wish away any meaningful judicial review through a broad invocation of "state secrets". To hold otherwise would be tantamount to handing the Executive a "blank check" to act as it pleases during times of war and peace, so long as it acts through secret programs.

IV. THE INVOCATION OF THE STATE SECRETS PRIVILEGE IS, IN ANY EVENT, INAPPROPRIATE HERE BECAUSE DEFENDANTS' PUBLIC STATEMENTS ARE SUFFICIENT TO ESTABLISH THAT THE NSA SURVEILLANCE PROGRAM VIOLATES THE CONSTITUTION AND FEDERAL LAW.

Particularly in light of the profoundly disturbing separation of powers issues discussed above, the Court should reject defendants' invocation of the state secrets privilege here because "the only facts necessary to resolve this dispute have been admitted by defendants". (Pls.' Mem. at 12.) As plaintiffs have demonstrated, defendants' public admissions fully and independently establish that the NSA Surveillance Program violates the Constitution and federal statutes, including FISA, the controlling law in the area of electronic surveillance which Congress expressly established as the "exclusive means by which electronic surveillance . . . may be conducted". 18 U.S.C. § 2511(2)(f). First, defendants have admitted that the NSA Surveillance Program exists. (See Pls.' Mem. at 6.) Second, defendants have indicated the categories of people whose communications they deem suspicious and intercept under the NSA Surveillance Program. (See id. at 6-7.) Third, defendants have admitted that the NSA intercepts communications through the Program without obtaining a court warrant, and explained how communications for interception are selected. (See id. at 7-8.) Fourth, defendants have admitted that the Program does not require a showing of probable cause that the surveillance targets are foreign powers or agents of a foreign power before communications are intercepted. (See id. at 8.) Finally, defendants have acknowledged that the Program constitutes "electronic surveillance" under FISA, but operates in circumvention of the statute. (See id. at 9.)

Because defendants' violation of law can thus be established based on public information, neither the parties nor the Court need consider any alleged state secrets. The existence of public information sufficient to make out a violation of law critically separates this case from other cases in which invocation of the state secrets privilege has been upheld—and should cause the Court to view defendants' reference to state secrets here with great suspicion. For instance, in El-Masri, 2006 U.S. Dist. LEXIS 34577, the government invoked the state secrets privilege in a lawsuit brought by a plaintiff who was allegedly extradited under the government's extraordinary renditions program. The El-Masri court accepted the government's argument in large part on the basis that the central facts about the renditions program had not been widely disseminated and that these details were necessary for adjudication of the dispute over plaintiff's extradition. Id. at *18. Indeed, the court drew a "critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case" and "[a] general admission provides no details as to the means and methods employed in these renditions, or the persons, companies or governments involved". Whether the court reached the correct conclusion in El-Masri in dismissing plaintiff's case, there can be no questions that no additional "details" or "specific facts" are required here because defendants have already publicly acknowledged sufficient details and facts to make out a violation of the law. Nothing more is required for a fair adjudication of this matter.

Conclusion

For the foregoing reasons, the Association respectfully requests that the Court reject defendants' invocation of the state secrets privilege.

June 28, 2006

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